limited way, as a regulatory categorization of particular telecommunications services when they are offered as part of the information services that the LEC provides. In other words, it could mean that the bundled wireline broadband Internet service, including its telecommunications component, are not to be regulated as "telecommunications service." As discussed below, this interpretation amounts only to what existing precedent seems to dictate.

Other aspects of the Notice, however, indicate that the Commission has something far more sweeping in mind, and that its tentative conclusion would free from Title II regulation all telecommunications capabilities of a type that are used by LECs to provide broadband Internet access. The Notice suggests this by raising the possibility that its tentative conclusion might be broadened to exempt the telecommunications components of information services from Title II regulation whether they are self-supplied or not.[150] The Commission also asks whether ILECs should continue to face any obligations under Section 251 to unbundle communications facilities that they use to provide broadband Internet access, a step that could be taken only if the Commission were proposing the deregulation of all telecommunications of the kind used for broadband Internet access. Indeed, the implications of this tentative conclusion are far broader than simple unbundling. For example, the Commission has long required incumbent LECs to permit collocation of DSL equipment, such as digital subscriber line access multiplexers (DSLAMs) in incumbent LEC central offices. At the same time, the Commission has not yet permitted collocation of pure "information service" equipment – that is, equipment that does not

perform telecommunications functions. If the Commission somehow declares DSL services to be information services, the Commission would have to reconcile that determination with its longstanding ruling (affirmed by the D.C. Circuit) that DSL transmission equipment falls squarely within the terms of section 251(c)(6) of the Act.

A. The Tentative Conclusion is Grounded in an Unjustified Semantic Analysis

Much of the Commission's analysis in support of its tentative conclusion is consistent with the law of the past two decades, finding support in both the 1996 Act and the *Computer Inquiry*. In *Computer II*, the Commission defined categories of "enhanced services" and "basic services" that were the precursors of, respectively, "information services" and "telecommunications services" as defined in the Act, and held to these definitions in *Computer III*.[151] The tentative conclusion that wireline broadband Internet access service (the bundle of services generally offered by ISPs and that includes telecommunications capability) is an "information service"[152] is consistent with both the Telecommunications Act and the *Computer II* definition of "enhanced services."[153] Likewise, the proposition that the transmission capability used to provide wireline broadband Internet access service constitutes

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[150] *Id.* ¶ 26. Indeed, when the Commission turns to a discussion of the regulatory implications of its tentative conclusions, its earlier conclusion that was limited to self-supplied telecommunications seems inexplicably to morph into a conclusion about the transmission aspect of wireline broadband internet access service generally. *Id.* ¶ 30. This may be due to the term the Commission has chosen to use to describe the particular bundled information service currently offered by many ISPs, "Internet access service." While the industry uses this term to denote the enhanced bundle offered to the end-user, which includes the underlying telecommunications transport services as well as "enhanced" capabilities, the Commission has not extended the rule applicable to such enhanced bundles to the telecommunications facilities included in the bundle. *Supra* Section III.A.2.c.; *infra* Section IV.A.

[151] *Computer II* ¶ 5; 47 U.S.C. § 153(20), (46).

[152] Notice ¶ 17.

[153] *Computer II* ¶ 5 ("enhanced service" provides "applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information."); 47 U.S.C. § 153(20) ("information service" offers a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications").

"telecommunications"[154] finds support in both the Act and the Computer II definition of "basic services."[155] Finally, the Commission is on solid ground when it tentatively concludes that this "information service" retains that statutory classification and escapes Title II regulation even if it includes a component that constitutes "telecommunications" under the Act.[156] Indeed, that was the point of the *Computer Inquiry*.

Despite these acceptable premises, the Commission is wrong when it warps the analysis into an unprecedented conclusion that when a LEC "self-supplies" the underlying telecommunications in broadband Internet service, that underlying telecommunications is no longer subject to Title II regulation. The Commission supports this conclusion with the argument that self-supplied telecommunications used for broadband Internet service cannot be a telecommunications service because it is not "offered" as the statute requires,[157] but "used" to provide an information service.

The Commission arrives at this tentative conclusion by ignoring precedent, narrowing its focus to the case of a "self-supplying" broadband Internet service provider, and erroneously using the perspective of the consumer end user. Thus, the Commission argues that "providers of wireline broadband Internet access service that provision that service over their own facilities do not offer 'telecommunications for a fee directly to the public.'"[158] That statement is accurate as a description of wireline broadband Internet service offered to the end user, but tells us nothing

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[154] Notice ¶ 17.

[155] 47 U.S.C. § 153(43) ("telecommunications" includes "transmission . . . of information of the user's choosing, without change in the form or content of the information as sent and received"); *Computer II* ¶ 96 ("basic service" is "virtually transparent in terms of its interaction with customer supplied information").

[156] Notice ¶ 21; *Computer II* ¶ 101.

[157] 47 U.S.C. § 153(46).

[158] Notice ¶ 25.

about the proper treatment of the telecommunications capability provided to the ISP for inclusion as part of that enhanced service. The diagram attached as Exhibit A illustrates how "telecommunications services" and "information services" have always been treated by the Commission.

Nothing in Commission precedent or the statutory language has ever suggested that the telecommunications inputs would be completely unregulated as the Commission suggests in the Notice. Rather, as applied historically, the Commission's treatment of enhanced services has served to ensure that the telecommunications component was not doubly regulated, first at the carrier level and again at the ISP level. Accordingly, the ISP is appropriately recognized as the customer for the telecommunications services.

One reaches the proper result by beginning with precedent and considering the case of a broadband Internet service provider procuring telecommunications capability. Under *Computer II*, the provider of an enhanced or information service is a consumer (not a provider) of the underlying telecommunications service. The provider of the transport/telecommunications service is providing a Title-II-regulated telecommunications service.[159] That transport/telecommunications service is being provided not to the consumer end user, but to a provider that in turn offers the end user an integrated package—an "enhanced" or "information" service. No decision of this Commission or any court, before or after passage of the 1996 Act, has altered that conclusion. And, indeed, the Commission has staunchly rejected any requests for such an alteration.

Another infirmity of the tentative conclusion is its assumption that self-supply of telecommunications can alter the coverage of the statute. Precedent establishes that integrating a

telecommunications service into an enhanced service offering cannot change the regulatory obligations that attach to the telecommunications service component of that enhanced service, even if the entity involved refuses to provide that telecommunications service component to anyone else. This can be seen in early decisions by the Commission and the courts rejecting attempts by the pre-divestiture AT&T to refuse access interconnection to its long-distance competitors by claiming that similar arrangements with AT&T Long Lines were just part of an integrated operation, and interconnection was not a separate "service" available to Long Lines or the competitors.[160] The Commission refused to accept AT&T's argument that "interconnection is not provided to Long Lines for these services but rather that Long Lines and the Associated Companies [the BOCs] 'are partners in the joint provision of interstate services.'"[161]

The Commission came to a similar conclusion in its 1995 *Frame Relay* decision.[162] In that case the Commission held that AT&T 's basic frame relay service was a "basic service" subject to Title II regulation.[163] The Commission specifically rejected AT&T's claim that its basic frame relay service should be treated as an enhanced service because it was sold as part of a package that included enhanced services.[164]

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[159] *Computer II* ¶¶ 114, 117.

[160] *Bell Telephone Co. of Pa. V.* FCC, 503 F.2d 1250 (3rd Cir. 1974); *MCI Communications Corp. v. AT&T*, 369 F.Supp. 1004 (E.D. Pa. 1973), *vacated*, 496 F.2d 214 (3rd Cir. 1974); *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, Docket 19896

[161] *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, Docket 19896, Decision ¶ 26 (rel. Apr. 23, 1974).

[162] *Independent Data Communications Manufacturers Assn.'s Petition for a Declaratory Ruling That AT&T's Interspan Frame Relay Service is a Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd 13717 (adopted October 16, 1995; rel. October 18, 1995) ("*Frame Relay Order*").

[163] *Frame Relay Order* ¶ 40.

[164] *Id.* ¶ 41.

Precedent, therefore, compels the conclusion that a carrier cannot escape Title II obligations otherwise applicable to transmission capabilities used for broadband Internet access by self-supplying those capabilities for use in its broadband Internet access service. Precedent indicates that self-supply establishes that the underlying capability is a telecommunications service. Congress effectively adopted the relevant aspects of that precedent, moreover, in the 1996 Act. As the Commission itself recognizes, the distinctions between "basic" and "enhanced" services under its pre-1996 precedents were carried over into the 1996 Act.[165] Based on that statute and its legislative history, the Commission has specifically found that,

> "Congress intended the categories of "telecommunications service" and "information service" to parallel the definitions of "basic service" and "enhanced service" developed in our Computer II proceeding, and the definitions of "telecommunications" and "information service" developed in the Modification of Final Judgment breaking up the Bell system.[166]

When Congress incorporates into a statute a prior regulatory approach in this way, it dictates the interpretation of the statute and requires that language of the statute be interpreted consistently with previous regulatory actions.[167] Here, the Commission may not, consistent with the governing legislation and the regulatory actions that that legislation codified, abandon its prior regulation of advanced services.[168]

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[165] Notice n. 38. *See also* H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 114-115 (1996) (definition of "information service" is similar to Commission's definition of "enhanced service"); *MCI Telecom. Corp. v. Sprint-Florida, Inc.*, 139 F.Supp. 2d 1342, 1348 (N.D. Fla. 2001).

[166] *Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report to Congress, 13 FCC Rcd. 11501 ("*Universal Service Report*") ¶ 21 (1998).

[167] *Cf. Strickland v. Comm'r, Me. Dept. of Human Svces.*, 48 F.3d 12, 20 (1st Cir.), *cert. denied*, 516 U.S. 850 (1995); *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993).

[168] By the same token, despite the suggestion in the Notice to the contrary, Notice ¶ 61, to the extent that a CLEC provides its own facilities-based DSL transport services that are incorporated in an internet access service, that CLEC is providing a "telecommunications service" for which it may request unbundled network elements under Section 251(c)(3) of the 1996 Act..

B. The Commission has Already Determined the Issues Raised in this Notice And Demonstrates No Lawful Basis for Reversing that Determination

Perhaps the most telling evidence that section 251 obligations apply to DSL-based services, is this Commission's staunch and – until now – consistent insistence that this is the case. In every order issued before this year regarding DSL-based services the Commission reached the same, unwavering, if more refined conclusions. To be sure, the incumbent providers have pursued every avenue to reach the conclusions that the Commission now proposes. And, at every turn they have met with resounding rejection by the Commission and frequently the courts.

A case in point is the Commission's positions – in its orders and its appellate briefs – on the very issues teed up in this Notice. In response to repeated appeals by Qwest and others, the Commission has clarified and refined its position with respect to DSL-based advanced services. ILECs must provide unbundled loops and linesharing to competitors use with DSL technologies. Advanced services are telecommunications services subject to unbundling. DSL-based technologies are advanced services. DSL services must be unbundled. Decisions on Section 271 interLATA authority give potentially dispositive consideration to the provision of service to DSL providers.[169] DSL providers are carriers. To now claim that these conclusions were wrong –or

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[169] *E.g., Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order (rel. June 30, 2000). ¶¶ 284-306; *Application of Verizon New England, Inc. Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance)NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc. for Authorization Under SectionM 271 of the Communications Act to Provide In-Region, InterLATA Service in Massachusetts,* CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130 (rel. April 16, 2001). ¶¶121-181; *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order (rel. January 22, 2001). ¶¶182-197; 214-222; *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. December 22, 1999) ¶¶316-336.

worse, to pretend that these prior decisions do not exist – cannot be squared with the Commission's arguments before the courts on these very issues.

US West, now Qwest, argued that DSL-based advanced services were not telephone exchange or exchange access services, and therefore were not subject to unbundling under section 251(c).[170] The Commission soundly rejected these arguments. On remand, the Commission again ruled that DSL-based advanced services are telecommunications services, subject to Title II and the section 251 unbundling obligation, even when such services are offered in connection with enhanced/information service.[171] The Commission concluded that an ILEC "may not avoid the obligations placed on incumbent LECs under 251(c) of the Act in connection with the provision of advanced services"[172] Although the Commission's determination that DSL was either exchange access or telephone exchange service was remanded for clarification, the United States Court of Appeals for the District of Columbia Circuit agreed with Commission's conclusion that unbundling obligations applied to ILEC-provided advanced services and accordingly rejected Qwest's claim that it had no obligation to unbundle loops for the provision of DSL services.[173]

Nothing in these decisions justifies altering the fundamental conclusion that these are telecommunications services subject to the 251 unbundling obligation. As the Commission concluded in 1999, "if Congress intended to remove xDSL-based advanced services from the

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[170] *Advanced Services Remand Order* ¶ 8; *WorldCom v. FCC*, 246 F.3d at 693.

[171] *Id.* ¶¶ 9, 37; *Advanced Services Order* ¶¶ 35-36.

[172] *Advanced Services Remand Order*, ¶ 3.

[173] *WorldCom v. FCC*, 246 F.3d 690, 695-6 (D.C. Cir. 2001) (concluding that there was "no error in the Commission's conclusion that it can apply § 251(c)" to ILECs.)

reach of section 251(c), Congress would have done so in a more explicit fashion."[174] If the Commission now "[r]emoves xDSL-based advanced services from the reach of Section 251(c)", the Commission, according to its own words, will violate the letter as well as the spirit of the Telecommunications Act.

Moreover, if the Commission removes the telecommunications service component that underlies ILEC-provided broadband Internet access service from Title II regulation, the way will be clear for ILECs to assert that many of their traditional common carrier offerings are already "information services" beyond the scope of Title II regulation, and to remove as many of their remaining common carrier services as possible from Title II by "enhancing" those services or simply relabeling them as "enhanced." It is by no means inconceivable, given the ILECs' history, that they would seek to exploit the "information services" exception and expand it to encompass all services, including HSDL T-1s, dial up, ISDN, T-1's DS3's and OCx telecommunications services which are capable of being used for Internet access, and thereby to remove themselves and their services from common carrier regulation.[175]

Indeed, the Commission reported to Congress that "carriers that offer basic interstate telecommunications functionality to end users (such as ISP subscribers) are 'telecommunications

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[174] *Advanced Services Remand Order* ¶ 10.

[175] Such a strategy has already been foreshadowed by SBC in March 1, 2002 comments filed in the *ILEC Broadband Regulation Proceeding* where it describes a variety of "cutting-edge" services combining "traditional Physical Layer transport capability" utilizing a wide variety of protocols "including Frame Relay, ATM, Ethernet, IP and Multiprotocol Label Switching (MPLS) combined with higher level capabilities in the network "to create *integrated, data-aware"* broadband networks. The primary customer applications for these services are linking corporate computer networks and connecting to the Internet." *ILEC Broadband Regulation Proceeding,* SBC Comments at 25. Later in the same Comments, SBC asserts that

> Once an incumbent LEC has deployed next generation packet transport equipment...the next logical step is to...offer...customers broadband services that act on information contained within packets, cells or frames. As such, many of these services fall squarely within the Commission's definition of an "information service."

Id. at 28-29.

carriers' covered by the relevant provisions of section 251 and 254 of the Act 'regardless of the underlying technology those services providers employ, and *regardless of the applications that ride on top of their services.*'"[176] There is simply no supportable basis to summarily reach the opposite conclusion, and engage in regulatory gamesmanship that will eviscerate Congress's clear intent that a major subset of telecommunications services be specifically protected by the 1996 Act.[177]

Such action cannot be accomplished under the governing statute with a statement of belief that it will "enhance competition among providers of telecommunications services."[178] It merely avoids the inquiry. Section 706 is not addressed to the promotion of *any* kind of competition, but specifically to the development of *telecommunications* competition in local markets. The Congressional intent to promote intramodal competition, specifically competition in the provision of telecommunications services, is clearly expressed in the statutory language. The Commission's focus should be there, not on avoiding the statutory classifications altogether.

C. There is No Basis for Extending the Tentative Conclusion To All Telecommunications Provided to ISPs

The Notice suggests an even more erroneous extension of its tentative conclusion, to include any transmission capability provided to a broadband Internet service provider.[179] This far-reaching "suggestion" would further undo a settled understanding of the regulatory status of telecommunications services used for broadband Internet access. Exploration of this question, moreover, goes well beyond the narrow issue that the Commission claims was left open in its

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[176] *Advanced Services Remand Order* ¶ 37 (quoting *Universal Service Report to Congress*, 13 FCC Rcd 11520 ¶ 39).

[177] 47 U.S.C. § 157 nt.

[178] 47 U.S.C. § 160.

1998 Report to Congress.[180] The Notice poses a variety of questions that are said to bear on this radical proposition, but in the end they all come down to the notion that the provision of DSL transport/transmission could be treated as "private carriage." The Commission asks whether ISPs should be deemed "the public" under the definition of "telecommunications service," but the question is already settled as a matter of law: "the public" for this purpose means the class of users at which the service in question is directed.[181] In identifying "the public" for purposes of the FCC's regulations defining common carrier status, the D.C. Circuit held:

> This does not mean that a given carrier's services must practically be available to the entire public. One may be a common carrier though the nature of the service is sufficiently specialized as to be of possible use to only a fraction of the total population.[182]

In the case of DSL transmission, ISPs form one of the major classes of users for the service, and therefore fit within the established definition of "the public." The Commission suggests that ILECs might escape regulation by offering DSL services through individually negotiated contracts.[183] In considering that stratagem, however, it is important to bear in mind that "a carrier cannot vitiate its common carrier status merely by entering into private contractual arrangements with its customers."[184] Finally, in considering this issue, the Commission should bear in mind that the "private carriage" issue is not a matter of Commission discretion:

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[179] Notice ¶ 26.

[180] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (rel. Apr. 10, 1998).

[181] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, CC Dockets Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 ¶11 (rel. Apr. 27, 2001).

[182] *National Assn. of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976).

[183] Notice ¶ 26.

[184] *Southwestern Bell Tele. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

> [W]e reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve.[185]

The Commission's suggestion that it might deregulate all telecommunications services used to provide broadband Internet access, therefore, is completely devoid of legal or factual support. The Commission should reject this radical notion.

D. The Tentative Conclusion Would Frustrate Important Policies And Create Perverse Incentives

Policy considerations require the same result, based on the uncertain effects of the Commission's proposal on many of the obligations that Title II imposes, and on the shambles it would make of the Act's pro-competitive regulatory scheme.

Although Covad's primary concern in these Comments revolves around the effect of the Commission's proposals on local telecommunications competition, many other policy objectives of the Act are also at risk. The Notice itself seems to recognize, for example, the uncertainty it creates about the effect of this proceeding on carriers' universal service obligations.[186] This is not the only set of obligations, however, that this proceeding may change in a significant way. Among the requirements that the Commission's proposal may affect are rights to access by those with disabilities,[187] slamming protections,[188] rate averaging and rate integration, and privacy protections. While the Commission's proposals in the Notice concerning competitive issues are demonstrably wrong-headed, when it comes to these other consumer protections, they are just a shot in the dark.

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[185] *National Assn. of Regulatory Utility Commissioners v. FCC*, 630 F.2d at 644.

[186] Notice ¶¶ 65-82.

[187] 47 U.S.C. § 255.

[188] 47 U.S.C. § 258.

The Commission's approach would also be bad policy because it would allow a vertically integrated Title-II-regulated entity to free itself of all Title II regulation either by making the underlying transport service available only to its affiliated ISP entity, or by labeling all its basic transport services "Internet access" offerings. In the first strategy, an ILEC could, for example, refuse to offer DSL service to any ISP except its affiliated ISP, and thereby remove its DSL service from Title II regulation. In other words, by engaging in anticompetitive, exclusionary conduct, the ILEC could achieve deregulation. The second ILEC strategy would be to offer basic residential or business service as "dial Internet access, Level 1", ISDN as "dial Internet access, Level 2", and give similar treatment to services based on T-1, DS3 and OCx technology, and thereby remove all other basic telecommunications services from Title II regulation. The Commission would err grievously and unlawfully if it gave incumbent carriers these weapons to defeat competitive DSL providers who continue to struggle to bring competition to this important telecommunications segment. The end result of this course of action would enable ILECs to dominate the provision of both wireline broadband Internet services and the telecommunications facilities needed for those services. As the Commission observed in *the Advanced Services Remand Order*, there is

> no evidence that Congress intended to eliminate the Commission's authority to require access to network elements used to provide advanced services – a result which is at odds with the technology neutral goals of the Act and with Congress' aim to encourage competition in all telecommunications markets.[189]

E. ILECS Must Still Provide DSL Carriers With Unbundled Loops and Line-Sharing

No lawful analysis can change the Act's requirements that ILECs must unbundle loops to facilities-based DSL competitors. The Congressional intent is clear. ILECs fall within the

statutory definition of those entities required to unbundle their networks. Loops and linesharing fall within the statutory definition of network elements that must be unbundled. And CLECs, including Covad, fall within the statutory parameters of those entitled to obtain and use those network elements to provide competing services. These fundamental conclusions have been the basis under which carriers, ILECs and CLECs have operated since 1996. Nothing has changed to warrant their reversal.

1. ILECs must provide unbundled loops and linesharing

ILECs must provide unbundled network elements under section 251(c)(3). Specifically, Congress mandated that ILECs have "the duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis."[190] Thus, so long as a carrier meets the statutory definition of an "incumbent local exchange carrier,"[191] it has an obligation to unbundle its local networks.[192] The carriers that the Notice proposes to relieve of their 251(c)(3) unbundling obligations meet the definition of an ILEC and are subject to the Act's unbundling obligation.

There has never been any serious debate that loops are "network elements" that must be provided on an unbundled basis.[193] Indeed, many would insist that the whole point of the unbundling requirement was to "open the local loop to competition." Loops are clearly "a

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[189] *Advanced Services Remand Order* ¶ 12.

[190] 47 U.S.C. § 251(c)(3).

[191] *See* 47 U.S.C. § 251(h).

[192] 47 U.S.C. § 251(c)(3); *see also Advanced Services Remand Order* ¶ 10.

[193] The statute defines "network element" as " a facility or equipment used in the provision of a telecommunications service. Such term also includes, features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing or other provision of a telecommunication service." 47 U.S.C. § 153(29).

facility" that is "used in the provision of a telecommunications service" by both CLECs and ILECs. Virtually every telecommunications service offered by an ILEC, for example, traverses the "loop" to reach the end-user customer and this has been true and will remain true over generational changes in loop technology. This unbundling obligation has repeatedly and pointedly been applied to the requirement to unbundle loops. Congress clearly and expressly mandate that unbundled loops be made available to competitive providers. Indeed, Congress specifically mandated that unbundled loops be provided in order for an ILEC to obtain interLATA authority under section 271 of the Telecommunications Act.[194]

The Commission has repeatedly required loop unbundling under section 251(c). Beginning in its *Local Competition Order*, the Commission has consistently and regularly concluded that a loop is a network element that must be unbundled for use by CLECs.[195] The Commission has never wavered from this conclusion, in part because there is no disagreement that a loop is clearly a network element used in the provision of telecommunications service by both ILECs and CLECs.[196] Moreover, since the earliest orders implementing section 251, the Commission has required that the loops be made available for the provision of services by CLECs utilizing DSL technology.[197] Nothing in the statute or Commission precedent permits these facilities to be exempted from the section 251(c)(3) obligations simply because they are also used for the provision of non-telecommunications services. Indeed, Congress saw fit to

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[194] 47 U.S.C. § 271(c)(2)(B)(iv) (conditioning grant of authority on, *inter alia*, provision of access to "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services").

[195] 47 CFR § 51.319(a). *Local Competition Order*, ¶ 377; *UNE Remand Order* ¶ 165.

[196] *Local Competition Order* ¶ 388; *UNE Remand Order* ¶¶ 181-183.

[197] *Local Competition Order*, ¶ 380; *UNE Remand Order* ¶¶ 165, 172, 190-191.

ensure that the "features, functions and capabilities . . . used in the transmission of telecommunications services" were *not* excluded from the unbundling obligation.[198]

This unbundling obligation is not eliminated for CLEC customers who use elements to provide services different from those provided by the ILECs, or to provide service differently than the ILEC provides service.[199] Indeed, one of the hallmarks of a competitive market is that carriers will use unbundled elements to develop new and innovative customer services. Indeed, it would be difficult to imagine a result more fundamentally at odds with the letter and spirit of the 1996 Act than concluding that competitors are only permitted to offer services that exactly replicate those of the ILECs. Thus, the Commission concluded that ILECs "will have an increased incentive to reduce their overall operating and capital cost and introduce new and innovative services . . . as they face competition for all their services."[200] Such innovation would be impossible if carriers were limited to duplicating existing ILEC offerings. As the Commission recognized, this conclusion was mandated by the statute's framework, purpose and language.[201]

The ILEC unbundling obligation is likewise not eliminated for CLEC customers who use elements to provide services that the ILEC does not provide at all.[202] To ensure that CLECs had versatility in the use of network elements, the Act requires, and the FCC agreed, that CLECs be

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[198] 47 U.S.C. § 153(29).

[199] *UNE Remand Order* ¶ 167.

[200] *Id.* ¶ 139.

[201] *Local Competition Order* ¶ 245; *UNE Remand Order* ¶ 139. The Telecommunications Act preamble states that it is "an act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, preamble.

[202] *Id.* ¶ 381; *UNE Remand Order* ¶ 191.

able to combine UNEs as they saw fit.[203] The Act further required that the Commission determine as part of its unbundling analysis, whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the *services it seeks to offer*."[204] Indeed, the growth of DSL-based service offerings was predicated on such Commission findings, since at the inception of CLEC provision of DSL offerings, the ILECs did not provide end-user DSL offerings.[205] Therefore, the Act mandates the right of facilities-based CLECs, such as Covad, to obtain unbundled ILEC loops and use them to provide DSL-based services, whether to end users, unaffiliated ISPs, or affiliated ISPs.

The same statutory provisions also mandate the right of a facilities-based CLEC, such as Covad, to obtain unbundled high-frequency portions of loops and use them to provide DSL service to ISPs, including when the CLEC "self-provides" the high frequency portion of the loop, and offers its own ISP services.[206] As the Commission concluded, the high frequency portion of the loop meets the requirements under the Act as an unbundled network element.[207] Linesharing over the unbundled high frequency portion of the loop permits competitors, including Covad, to compete with ILECs on same efficiency basis as the ILECs (which have always offered DSL-based services exclusively on a line-shared basis) in providing both DSL transport and Internet access over DSL.[208] In its *Linesharing Reconsideration Order*, the Commission expressly

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[203] 47 U.S.C. § 251(c)(3); 47 C.F.R. § 51.315. *See also AT&T v. Iowa Utils.* 119 S.Ct. 721 (1999).

[204] 47 U.S.C. § 251(d)(2)(B).

[205] *CEA Report* n. 14.

[206] *Advanced Services MO&O* at ¶ 37.

[207] *Linesharing Order ¶ 25; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 96-98, Third Report and Order on Reconsideration in CC Docket No. 98-147 (rel. Jan. 19, 2001) ("*Linesharing Reconsideration Order*")¶ 5.

[208] *Linesharing Order ¶ 33; Linesharing Reconsideration Order ¶ 5.*

concluded that "it would be inconsistent with the intent of the *Linesharing Order* and the statutory goals behind sections 706 and 251 of the 1996 Act to permit the increased deployment of fiber-*based* networks by incumbent LECs to unduly inhibit the competitive provision of xDSL services."[209]

The outcome of this proceeding, even the erroneous outcome that the Commission envisions, should not alter CLECs' right to engage in line-sharing. The Commission's *Linesharing Order* established that the high-frequency portion of the loop is a network element that must be unbundled to CLECs providing ADSL and other compatible services. The high frequency portion of the loop is a network element because it is a "capability" of the loop, which in turn is a "facility . . . used in the provision of telecommunications services," as set out in Section 3(29) of the Act.[210] The high frequency portion of the loop, moreover, meets the requirements for unbundling under Section 253(c)(3), in that denial of access to this network element would impair competitive carriers' ability to provide certain DSL-based services by prohibiting them from competing with ILECs on the same efficiency basis as the ILECs.[211] At the risk of provoking an ILEC theory not yet embodied in the Notice, nothing proposed or suggested in the Notice changes these conclusions.

Thus, it is clear that the well-settled ILEC obligation to provide unbundled loops and linesharing will not be altered simply because those loops are also used to provide services that utilize DSL-based technologies. These elements are the building blocks of the ILEC telecommunications network and are used for the provision of telecommunications services.

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[209] *Id.* ¶ 13.

[210] *Linesharing Order* ¶ 17.

[211] *Id.* ¶¶ 29-61.

Accordingly, the statutory language clearly mandates that these facilities be *unbundled* and made available to competing providers in accordance with the terms of section 251 and 252.

2. CLECs Maintain the Right to Use Loops To Provide DSL-Based Services

The right of facilities-based CLECs to use unbundled loops to provide the services of their choosing, including services using DSL technologies, is clearly mandated by Act and cannot be "interpreted away". When carriers, such as Covad, offer transport using DSL-based technologies, those transport capabilities constitute "telecommunications". When that carrier provides this telecommunications capability to ISPs or to end users, it is providing a telecommunications service. Even ILECs have agreed that advanced services constitute telecommunications services.[212] The conclusion does not vary if the ISP is affiliated with the CLEC. Accordingly, CLECs are "requesting carriers" under section 251(c)(3), using loops or the high frequency portion of the loop to provide "telecommunications *service*." There can be no justification for exempting their access to unbundling under the clear language of the statute. The Commission has reached this conclusion in the past, as has the ILEC community.

[212] *Advanced Services Remand Order* ¶ 9 (quoting US West Comments at 19).

CONCLUSION

For all the reasons set forth herein, Covad urges the Commission to revise its tentative conclusion to comport with reality and the statutory framework created by Congress in 1996.

Respectfully submitted,

COVAD COMMUNICATIONS COMPANY

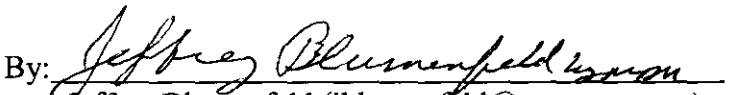
By: 

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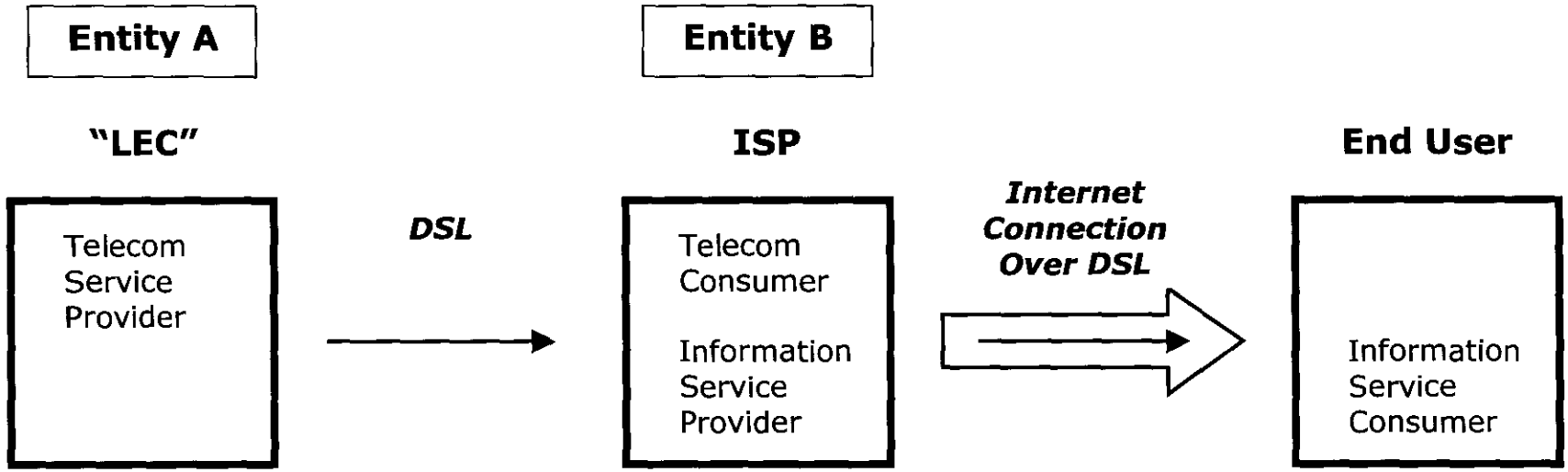
EXHIBIT A



Transport/telecom service
Regulated
Basic telecommunications service

Information service
Unregulated
Enhanced information service

Entity A provides DSL to Entity B. DSL is a transport/telecom service, a regulated, basic service. The service provided by Entity A is a basic, regulated, telecommunications service regardless of whether Entity A is an ILEC or a CLEC. The service provided by Entity A is a basic, regulated, telecommunications service regardless of whether Entity A is integrated within a single corporation with Entity B, is a corporate affiliate of Entity B, or is unrelated to Entity B.

Entity B is a *consumer* of the DSL service. Entity B *provides* Internet Connection over DSL to the End User. The service provided by Entity B a single integrated service, which is an information service, a non-regulated, enhanced service. The service provided by Entity B is a single, unregulated, enhanced information service regardless of whether Entity B is an ILEC, or a CLEC, or neither an ILEC nor a CLEC. The service provided by Entity B is a single, unregulated, enhanced information service regardless of whether Entity B is integrated within a single corporation with Entity A, is a corporate affiliate of Entity A, or is unrelated to Entity A.

CERTIFICATE OF SERVICE

I, Leslie LaRose, hereby certify that on this 3rd day of May, 2002, I have served a copy of the foregoing document via hand delivery to the following:

Leslie LaRose

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